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Protection against violence and discrimination based on sexual orientation and gender identity

Note by the Secretary-General

The Secretary-General has the honour to transmit the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Vitit Muntarbhorn, in accordance with Human Rights Council resolution 32/2.

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Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*

Summary

The theme of the present report is "Embrace diversity and energize humanity". Key developments in 2017 are noted, particularly in regard to the progression of human rights law and practice at the international and national levels; intersectionality between sexual orientation and gender identity and other issues concerning violence and discrimination; and dialogue and cooperation between the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and stakeholders.

Two of the various underpinnings introduced in the Independent Expert's first report (A/HRC/35/36) are singled out for particular attention to help prevent and overcome violence and discrimination: namely, decriminalization of consensual same-sex relations and gender identity and expression, and effective anti-discrimination measures. The report includes an overview of country situations, as highlighted by various actors through submissions sent to the Independent Expert. The report calls for reform of the laws, policies and practices which criminalize consensual same-sex relations, as well as those relating to gender identity and its expression. Pending repeal of discriminatory laws, the preferred policy is to desist from applying such negative laws and policies. Effective anti-discrimination measures are also critically needed; they vary from laws to policies and other action in a comprehensive and human rights-responsive setting.

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I. Introduction

"Regularly people tell me I do not have the right to live."
Nikita (18), transgender man[a]

"Violence and discrimination occur in all public and private entities."
Economic Commission for Latin American and the Caribbean[b]

"Research shows that a country's growth is inversely correlated with the level of discrimination against ethnic, religious and sexual minorities under the law."
World Bank[c]

[a] *Out in the Open: Education Sector Responses to Violence based on Sexual Orientation and Gender Identity/Expression* (United Nations Educational, Scientific and Cultural Organization, Paris, 2016), p. 22. Available from http://unesdoc.unesco.org/images/0024/002447/244756e.pdf.

[b] Submission of the Economic Commission for Latin American and the Caribbean to the Independent Expert. In June 2017, in accordance with his call for information, a variety of stakeholders submitted their responses to the Independent Expert.

[c] See Elaine Panter and others, *Antidiscrimination law and shared prosperity: an analysis of the legal framework of six economies and their impact on the equality of opportunities of ethnic, religious, and sexual minorities*, Policy Research Working Paper WPS 7992 (World Bank Group, 2017), summarized in submission of the World Bank to the Independent Expert.

1. The theme of the present report is "Embrace diversity and energize humanity". It has been submitted by Vitit Muntarbhorn, who in 2016 was appointed as the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolution 32/2. He wishes to warmly thank Governments, international organizations, non-governmental organizations, communities, individuals and other stakeholders for their kind support. In accordance with the request of the Council in its resolution 32/2, paragraph 4, the first report of the Independent Expert was submitted to the Council in April 2017 (A/HRC/35/36). The present report is submitted in line with paragraph 4 of the same resolution, in which the Council requested the Independent Expert to present a report to the General Assembly at its seventy-second session. The Independent Expert will elaborate upon the six underpinnings mentioned in his first report, adjusted as follows: decriminalization of consensual same-sex relations and of gender identity and expression; effective anti-discrimination measures; legal recognition of gender identity; destigmatization linked with depathologization; sociocultural inclusion; and education with empathy. The present report (part one) will address the first two underpinnings, decriminalization and anti-discrimination. Parts two and three, due in 2018, will deal with the other underpinnings consecutively.

2. It should be recalled that everyone has some form of sexual orientation and gender identity. Sexual orientation denotes a person's physical, romantic and/or emotional attraction towards others, while gender identity concerns a person's self-perceived identity, which may be different from the sex assigned at birth, as well as the expression of gender identity. The two notions should not be conflated. However, it is unconscionable that persons with an actual or perceived sexual orientation and/or gender identity different from a particular social norm are targeted for violence and discrimination in many parts of the world. Killings, rape, mutilation, torture and cruel, inhuman and degrading treatment as well as arbitrary detention, abduction, harassment, physical and mental assaults such as lashings and forced surgical interventions, bullying from a young age, pressures leading to

suicide, and discriminatory action, aggravated by incitement to hatred, in relation to sexual orientation and gender identity are pervasive in numerous settings.

3. The establishment of the mandate to promote action against violence and discrimination based on sexual orientation and gender identity is anchored in international human rights law, and it is a momentous commitment to multilateralism. It is an invitation to be forward looking and an incentive to move forward together. The present report is thus a clarion call to embrace diversity, complemented by the belief that respect for human rights energizes human society, yielding a positive dividend in terms of peace, sustainable development and societal inclusiveness. It also contributes to economic benefits, while reinforcing a sense of common humanity transcending borders and cultures.

II. Methodology

4. From the outset, the Independent Expert has adopted an approach of open and constructive dialogue and engagement with a broad range of stakeholders. He has drawn from a variety of sources — governmental, intergovernmental and non-governmental — for his work, balancing among them. He has also held separate meetings with embassies, United Nations agencies and concerned groups to amplify discussions. For the present report, the Independent Expert sent out a letter in May 2017 asking for inputs. The responses, received before the end of June 2017, have been integrated into the report where relevant, and they may also be incorporated into his future reports. He conveys his deepest thanks to all who responded to his request.

5. Through the methodology outlined above, the Independent Expert wishes to give voice to the many national actors who are instrumental in prompting the review and repeal of laws that discriminate against people on the basis of their sexual orientation or gender identity and expression and who contribute to the adoption of non-discrimination provisions. He also wishes to highlight dynamics at the national level and the role of various pillars of the States which can activate the reform process. The report is not intended to provide a comprehensive and geographically inclusive overview of the two underpinnings.

III. Mandate

6. The Independent Expert follows and responds closely to the mandate established by resolution 32/2. The post of the Independent Expert is pro bono. Key elements emanating from the mandate can be summarized under five main areas as follows: implementation of international instruments, with identification of good practices and gaps; awareness of the violence and discrimination issue, and linkage with root causes; engagement, consultation and cooperation with States and other stakeholders; identifying multiple, intersecting and aggravated forms of violence and discrimination; and support for international cooperation and related services to assist national efforts. The Independent Expert offered an analysis of those elements in his first report and in the present report will update them with recent developments.

7. Some preliminary considerations shed light on the operationalization of the mandate. First, the acronym LGBT often appears and is closely linked with the mandate. It stands for "lesbian, gay, bisexual and transgender person(s)". The term "intersex persons" is abbreviated as "I" and a recent definition is as follows: "intersex persons are born with bodies that vary from male or female". It should be

noted that being intersex is distinct from sexual orientation and gender identity and that intersex people face different issues.[1]

8. Second, the Independent Expert is totally conscious of the various sensitivities underlying the mandate. Effective responses on this front would have to be grounded in international human rights law and targeted against violence and discrimination. There is no advocacy of new rights. The modus operandi of the Independent Expert is thus to engage with a broad range of stakeholders, open doors, build bridges and offer windows of opportunities for constructive change.

9. Third, the mandate recognizes that the issue of sexual orientation and gender identity interplays with a variety of pillars of power at the national and international levels. For instance, there may be a healthy range of opinions at the national level in many countries, with the judiciary or parliamentary pillar being more progressive than the executive branch or vice versa, offering the possibility of reform in regard to those national measures that are not in conformity with international standards. The diversity of pillars will be further illustrated below (see table, sect. VI). There is also a call for more space for a strong civil society, national human rights institutions and human rights defenders. In fact, the need for effective checks and balances to prevent abuse of power and to ensure compliance with international human rights law invites a diversity of processes and mechanisms respectful of international law.

10. Fourth, precisely because so many issues under the mandate reach out to an array of sectors and professions, it is essential to broaden the discourse and vistas for cooperation. For example, change in the medical and scientific sector is pivotal in helping to prevent violence and discrimination relating to health concerns. Where the situation was once pathologized, giving rise to potential or actual abuse and stigma, there is now momentum towards depathologizing and destigmatizing in relation to sexual orientation and gender identity, with due regard to ensuring access to comprehensive and quality health care for all. If the issue is interrelated with employment, there is now a call to interlink increasingly with the business sector. Where there are issues of faith and religion, it is important to reach out to spiritual leaders and actors and seek interfaith cooperation to complement international standards. Where there is a quest to shun hate speech and incitement to violence, a key catalyst is the ever-growing presence of social media and its responsiveness to human rights.

11. Fifth, there is the context-specific nature of each country. The situation is not necessarily the same for LGBTI persons across the board; the scenario is not homogeneous but heterogeneous. In one country, for example, transgender (trans) persons are not permitted to change their identification documents (such as a birth certificate or identity card) to have their self-identified gender recognized, or they are required to meet abusive requirements such as compulsory surgery and sterilization, medical certification or divorce. The lack of status recognition results in a range of complications, such as bullying from a young age, sexual assault, and mockery and humiliation inflicted on them in daily life as well as when they seek to cross borders or access services and facilities. Nevertheless, in that same country there is no law against same-sex relationships and the situation is quite open for gays, lesbians and bisexuals. While the situations are diverse, it should be underlined that human rights predicate the protection of all persons without distinction.

[1] Submission of Global Action for Trans Equality to the Independent Expert (https://transactivists.org/).

12. Sixth, there is the welcome development that sexual orientation and gender identity is now an integral part of the United Nations agenda; the issue is legitimized and synchronized for global action. While there is always room for a plurality of views, the commitment to combat violence and discrimination is universal and ineluctable. It is enhanced by the all-embracing pledge that no one will be left behind, set out in the preamble to resolution 70/1, entitled "Transforming our world: the 2030 Agenda for Sustainable Development", adopted by the General Assembly on 25 September 2015.

IV. Key developments

13. The present section highlights developments in the past few months, particularly in relation to action against violence and discrimination at the international and national levels, the intersectionality between sexual orientation and gender identity and other issues, such as children and youth, and the Independent Expert's dialogues and support for international and national cooperation. Good practices and gaps are identified in sections V and VI on decriminalization and anti-discrimination, respectively.

A. Progression of human rights law and practice at the international and national levels

14. The right to be free from discrimination is enshrined in article 2 of the Universal Declaration of Human Rights and all human rights treaties. Issues relating to sexual orientation and gender identity have been dealt with by the monitoring bodies under the human rights treaties in their relationship with States, and a number of those bodies, including those created under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of Persons with Disabilities, have adopted general comments that refer expressly to sexual orientation and gender identity. The mandate of the Independent Expert is founded on this bedrock of international human rights law.

15. More recently, the views adopted in 2017 by the Human Rights Committee in the case of *G. v. Australia*, favouring the request of a married transgender person to have a birth certificate that correctly identifies the person's gender identity, strengthen the right to be free from discrimination, as well as the right to privacy and family.[2]

16. All countries have engaged with the universal periodic review of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and largely with one or more of the special procedures. There has been much coverage of the issue of sexual orientation and gender identity under those mechanisms, particularly from the perspectives of anti-violence and anti-discrimination. A total of 113 States Members of the United Nations from all regions have voluntarily accepted, in the context of the universal periodic review, at least one recommendation to address violence and discrimination based on sexual orientation and gender identity, and this is welcome.

[2] See communication No. 2172/2012, *G. v. Australia*, views adopted on 17 March 2017.

17. The initiatives of regional organizations have added constructive developments. The European human rights system, the inter-American human rights system, the African human rights system, the Arab Charter on Human Rights and the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration all uphold the right to be free from discrimination and have provisions countering violence to human life that can bolster the protection of persons under the rubric of sexual orientation and gender identity. Importantly, the European Court of Human Rights in 2017 found that forced sterilization (particularly affecting transgender people who wish to have their self-perceived gender identity recognized by the State) was in contravention of human rights;[3] another case found that a local law constraining free speech in relation to sexual orientation was in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms.[4]

18. The inter-American system has made many contributions to action against violence and discrimination. In addition to its important range of human rights-related declarations and conventions, the Inter-American Court of Human Rights Court and the Inter-American Commission on Human Rights, the inter-American system has appointed a regional rapporteur to cover the issue of LGBTI persons specifically. Resolution 275 of the African Commission on Human and Peoples' Rights, entitled "Protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity", resonates with the message of non-violence and equality.[5]

19. Participants in a meeting of national human rights institutions from the African region in 2017 expressed such a welcome perspective, noting that, in Africa, religion was inevitable. There was no process of inclusion and evolution of any type that could happen without faith leaders being one major actor. National human rights institutions could engage with already existing inclusive faith leaders and faith-based organizations that were advocating the rights of all. The positive voices provided opportunities to build on.[6]

20. Recent welcome developments at the national level include a new law enacted by the Parliament of Canada (Bill C-16) expanding protection under the Canadian human rights law to cover transgender persons, including protection from hate speech,[7] and in Germany[8] and Taiwan Province of China,[9] moves towards recognition of same-sex marriage. In India, the Ministry of Drinking Water and Sanitation issued guidelines in April 2017, directed to all states, to allow transgender persons to use the facility of their choice in community or public toilets,[10] and a Ministry of Health and Family Welfare resources kit for adolescents explains that same-sex attraction is

[3] *A.P., Garcon and Nicot v. France*, European Court of Human Rights (6 April 2017).

[4] *Bayev and others v. Russia*, European Court of Human Rights (20 June 2017).

[5] Adopted at the fifty-fifth ordinary session of the Commission, held in Luanda from 28 April to 12 May 2014. Available from www.achpr.org/sessions/55th/resolutions/275/.

[6] Network of African National Human Rights Institutions, *Report of the Face to Face Workshop for Staff of National Human Rights Institutions on Sexual Orientation, Gender Identity and Human Rights* (Nairobi, 2017), pp. 7 and 10. Available from www.nanhri.org/2017/05/11/workshop-report-sogi-and-human-rights-for-the-staff-of-african-nhris/.

[7] Available from www.parl.ca/DocumentViewer/en/42-1/bill/C-16/royal-assent.

[8] Timothy Jones, "Germany's Bundestag passes bill on same-sex marriage", *Deutsche Welle*, 30 June 2017. Available from www.dw.com/en/germanys-bundestag-passes-bill-on-same-sex-marriage/a-39483785.

[9] J. R. Wu, "Taiwan court rules in favour of same-sex marriage, first in Asia", Reuters, 24 May 2017. Available from www.reuters.com/article/us-taiwan-lgbt-marriage-idUSKBN18K0UN.

[10] Dipak K. Dash, "US dithers but India aids third gender with bathroom bill", *Times of India*, 5 April 2017. Available from http://timesofindia.indiatimes.com/india/ensure-toilet-access-to-3rd-gender-centre-tells-states/articleshow/58018540.cms.

normal.[11] Peru introduced a new education curriculum on 1 January 2017 which makes it mandatory to teach about sexual and reproductive rights, abortion, sexual orientation and gender identity, and in March 2017 Japan updated its basic policy for the prevention of bullying, which expressly protects sexual and gender minority students.[12] Several initiatives have also been taken in 2017 to ban "conversion therapy", for example in Taiwan, Province of China,[13] in the State of Victoria (Australia)[14] and in the State of California (United States of America).[15]

B. Intersectionality between sexual orientation and gender identity and other issues concerning violence and discrimination

21. In his first report, the Independent Expert underlined the relationship between sexual orientation and gender identity and other issues, including racism, poverty, migration, disability and other factors. A particular concern to be highlighted here is the plight of children and youth from the perspective of gender diversity. Thus, on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2017, the Independent Expert and a range of United Nations human rights treaty bodies and special procedures, as well as regional mechanisms, issued a joint statement calling for protection of transgender and gender diverse children and adolescents. The following excerpt epitomizes the universal message:

> We call on States to adopt and implement effective measures prohibiting violence, anti-discrimination laws covering gender identity and expression — real or perceived — as well as sexual orientation as prohibited grounds for discrimination, to develop inclusive curriculums and learning materials, training for and support to teachers and other school staff, education and support programmes for parents, safe and non-discriminatory access to bathrooms, and awareness-raising programmes nurturing respect and understanding for gender diversity.
>
> ...
>
> On another front, the mere existence of laws or by-laws criminalizing gender expression including through offences of "cross dressing" or "imitating the opposite sex" and other such discriminatory regulations impact on the liberty and security of these young people, tend to foster a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity.
>
> Criminalization and pervasive discrimination in such context lead to the denial of health care, including safe gender affirming procedures, and to the lack of access to information and related services. Pathologizing trans and gender diverse people — branding them as ill based on their gender identity and expression — has historically been, and continues to be, one of the root causes behind the human rights violations against them.

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[11] Abantika Ghosh, "Same-sex attraction is OK, boys can cry, girl's no means no", *Indian Express*, 21 February 2017. Available from http://indianexpress.com/article/india/same-sex-attraction-is-ok-boys-can-cry-girls-no-means-no-health-ministry-sex-education-4535410/.

[12] Human Rights Watch, "Japan: anti-bullying policy to protect LGBT students" (24 March 2017). Available from https://www.hrw.org/news/2017/03/24/japan-anti-bullying-policy-protect-lgbt-students.

[13] Chang Ming-hsuan and Kuo Chung-han, "Conversion therapy to be prohibited by regulation", Focus Taiwan News Channel. Available from http://focustaiwan.tw/news/asoc/201701020016.aspx. 3e

[14] Victoria, Australia, Health Complaints Bill 2016. Available from www.legislation.vic.gov.au /domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA257CCA00177A46CA257F54007D8E3C/$FILE/581059exi1.pdf.

[15] Greg Stohr, "Gay-conversion therapy ban survives as Supreme Court rejects appeal", Bloomberg, 1 May 2017. Available from https://www.bloomberg.com/politics/articles/2017-05-01/gay-conversion-therapy-ban-survives-as-high-court-rejects-appeal.

> We reiterate our call for States to decriminalize and depathologize trans and gender diverse identities and expressions, including for young transgender people, prohibit "conversion therapies" and refrain from adopting new criminalizing laws and pathologizing medical classifications, including in the context of the upcoming review of the International Classification of Diseases. We also call on States to provide equal access to health care and access to gender affirming treatment to those who seek it.[16]

22. The Independent Expert has also received submissions from various sources concerning the plight of children and youth in relation to violence and discrimination, such as bullying at home and at school.[17] A variety of issues deserving more attention, ranging from discriminatory sexual consent laws to access to information, conversion therapy, rights of transgender children, rights of intersex children, children of same-sex couples and access to justice have also been raised.[18]

C. Dialogue and cooperation between the Independent Expert and stakeholders

23. Since the first report submitted by the Independent Expert, he has attended a range of conferences and consultations and participated in related activities. For example, he participated in a conference in New York in early 2017 on the role of the business sector in the integration of sexual orientation and gender identity into their policy and practices, as monitored by a gender equality index and as recognized through a number of awards for exemplary performance. Indicators for measuring performance include the need for specific corporate policy reflecting sexual orientation and gender identity at the administrative level as well as in the entire work place, with training for mutual respect and provision of remedies in the case of discrimination. The Independent Expert highlighted the importance of incentivization in the work place, side by side with accountability, as well as integration of the message of non-discrimination throughout the supply chain and interaction with small-scale industries, which are often closest to the general population, particularly in developing countries. When the workplace personifies an environment of non-discrimination and both management and workers feel a sense of inclusion and belonging, there is a key dividend in both economic and social terms, adding to the positive value chain in the global-local dynamic.

24. The Independent Expert took part in a lecture at a seminar for human rights defenders in Manila, highlighting in particular the channels for activating communications through the United Nations special procedures to seek protection and redress. He attended various European activities in relation to the International Day against Homophobia, Transphobia and Biphobia in Brussels, calling for strategic action to overcome violence and discrimination, including the need for human rights-sensitive laws, policies, programmes, case enforcement in the courts, accessible mechanisms and personnel, resources, education and monitoring, data generation, accountability provisions, and networking and mobilization for national reforms to comply with international standards. During the regular session of the Human Rights Council in March 2017, he contributed to a panel on transgender persons, mental health and human rights and advocated the need to engage more strongly with the health sector, particularly on such issues as conversion therapy,

[16] See "Embrace diversity and protect trans and gender diverse children and adolescents", International Day against Homophobia, Transphobia and Biphobia, 17 May 2017. Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622.

[17] Submissions of ASEAN Sexual Orientation, Gender Identity and Expression Caucus and Civil Society Coalition on the Convention on the Rights of the Child to the Independent Expert.

[18] Submission of Child Rights International Network to the Independent Expert.

forced sterilization, medical diagnosis and counselling, all of which might be interlinked with violence and discrimination, as well as the need for comprehensive health care for all. Concurrently, he helped to train human rights defenders from several parts of the world on the issue of sexual orientation and gender identity in a session organized by a non-governmental organization.

25. The Independent Expert underlines the key role of civil society and human rights defenders and the need for more effective action to counter threats and reprisals against them. Of note is a submission to the Human Rights Council by a number of non-governmental organizations earlier this year, in which they called upon States, inter alia:

(a) To review and repeal all laws and policies which, directly or indirectly, criminalize, stigmatize or discriminate against LGBTI defenders;

(b) To ensure the protection of human rights defenders working on issues of sexual orientation, gender identity and expression, and sex characteristics, against any violence, threat, retaliation, de facto or de jure discrimination, pressure or any other arbitrary action perpetrated by the State or non-State actors, in response to their human rights activities;

(c) To remove barriers to the full recognition, registration and/or accreditation of organizations that promote and protect the human rights of persons of diverse sexual orientation, gender identity and expression, and sex characteristics at the national, regional and international levels;

(d) To ensure that organizations working on issues related to sexual orientation, gender identity and expression, and sex characteristics can seek, receive and use funding and other resources from individuals, associations, foundations or other civil society organizations, foreign Governments and aid agencies, the private sector, the United Nations and other entities.[19]

26. The joint submission of non-governmental organizations (see para. 25) echoes similar appeals made to States by a variety of United Nations entities and regional bodies.[20] United Nations programmes already deal with the issue of sexual orientation and gender identity in many parts of the world, which is most welcome. The work of OHCHR on sexual orientation and gender identity continues apace, and a new version of the publication *Born Free and Equal* is due soon.[21] OHCHR support for linkage between international and regional human rights mechanisms was a key input for a meeting between the Inter-American and African systems in 2015, and it is hoped that the linkage will be further strengthened in the future, perhaps to reach out to the Arab and ASEAN systems and other Asian initiatives, such as from South Asia, with lessons learned from other regional systems. Various parts of the global geography need more coverage and capacity-building, including

[19] Joint written statement by non-governmental organizations, May 2017 (A/HRC/35/NGO/119).

[20] See for example A/70/217; A/HRC/7/14/Add.1, A/HRC/10/12, A/HRC/13/22 and Add.3, A/HRC/14/23/Add.1 and Add.2, A/HRC/16/44, A/HRC/17/27/Add.1, A/HRC/26/29 and A/HRC/34/52; African Commission on Human and Peoples' Rights resolution 376 (LX) 2017 (available from www.achpr.org/sessions/60th/resolutions/376/); Organization of American States General Assembly resolution AG/RES. 2908 (XLVII-O/17); and Joint Statement for the International Day against Homophobia and Transphobia, 17 May 2014 (www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14602&LangID=).

[21] See Office of the United Nations High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (HR/PUB/12/06); and OHCHR, *Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (HR/PUB/16/3).

Central and North Asia and the Pacific islands. A variety of research is being carried out to provide more data and analysis of the situation.[22]

27. The Independent Expert is also in touch with the newly established Equal Rights Coalition, which is a coalition of 35 States reaching out to a broad range of partners based on the founding principles of equality, universality, international human rights law and open, respectful and constructive dialogue and cooperation with all stakeholders.

28. At this juncture, the report will now turn to various key underpinnings which interrelate closely with violence and discrimination. Two are singled out for special attention and they are presented below. Other underpinnings will be dealt with, incorporating recent inputs from stakeholders, in future reports of the Independent Expert in 2018.

V. Decriminalization of consensual same-sex relations and gender identity (covering also gender expression)

29. In the past 20 years, approximately 25 countries from all regions have taken steps to decriminalize same-sex relationships between consenting adults. Some of the most recent countries to undertake decriminalization are Belize, Mozambique, Nauru, Palau, Sao Tome and Principe and Seychelles. In some countries the judiciary has opened the way for decriminalization through landmark decisions on specific cases, whereas in other countries decriminalization of same-sex relations has materialized by the actions of the parliament and/or the executive branch through the review of their penal code.

30. The gaps are, however, omnipresent, despite a global trend towards decriminalization of consensual same-sex relationships.[23] More than 70 countries still criminalize same-sex relations,[24] with particular impact on gay and bisexual men and other men who have sex with men.[25] Of those, at least 40 countries criminalize same-sex relations between lesbian and bisexual women and other women who have sex with women. The death penalty may be applied in a number of countries in the African and Asian regions. More particularly, the death penalty is imposed throughout the territory of four countries and in certain provinces of two others, and in two States the death penalty is carried out by non-State actors. In five other States the death penalty could technically be imposed but it is not invoked.[26]

31. In several countries, laws also specifically criminalize transgender persons based on their gender identity or expression. Some countries criminalize so-called

[22] See, for instance, submission of United Nations Development Programme (UNDP) and International Labour Organization (ILO) to the Independent Expert, "Working as LGBTI in Asia: study on employment discrimination based on sexual orientation, gender identity and intersex status in China, the Philippines and Thailand" (Bangkok, forthcoming); submission of the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) to the Independent Expert; submission of Viet Nam context analysis report on lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) rights to the Independent Expert, by Institute for Studies of Society, Economy and Environment (Viet Nam); and submission of COC-Netherlands Federation of LGBT Organizations to the Independent Expert.

[23] See OHCHR, *Living Free and Equal* (HR/PUB/16/3), in reference to Achim Hildebrandt, "Routes to decriminalization: a comparative analysis of the legalization of same-sex acts", *Sexualities*, vol. 17, chap. 3 (2004).

[24] In some cases, provisions do not make explicit reference to same-sex relations but refer to vague and undefined concepts, such as "acts against the order of nature".

[25] See Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia*, 12th ed. (International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), May 2017). The Independent Expert also received a submission from Human Rights Watch.

[26] See Carroll and Mendos, *State-Sponsored Homophobia*.

"cross-dressing", while many others criminalize different forms of gender identity and expression though often vaguely defined laws, leading to various human rights violations of transgender people, including arbitrary arrests and detention.

32. The criminalization of consensual same-sex relations between adults of the same sex violates States' obligations under international law, including the obligation to protect privacy and to guarantee non-discrimination.[27] Such violations occur even when the law is not enforced.[28] As such, arrests and detentions on the basis of sexual orientation, gender identity or expression are to be considered arbitrary.[29] The imposition of the death penalty for offences related to homosexuality violates the right to life as it does not pass the qualification criteria of "most serious crimes", as provided for in article 6 of the International Covenant on Civil and Political Rights. Criminalization of same-sex relations also fuels stigma, legitimizes prejudice and exposes people to family and institutional violence and further human rights abuses such as hate crimes, death threats and torture. All such provisions should be repealed.[30]

33. As highlighted in some contributions, laws and policies which criminalize same-sex relationships and gender identity, particularly in regard to its expression, directly lead to violence and discrimination, and are also part of the background environment in which they take place. They also stymie efforts to prevent and reduce HIV transmission.[31] Conversely, inclusion policies and practices help to overcome discrimination and contribute to the realization of the Sustainable Development Goals.[32]

34. There are other laws and policies of a more indirect nature that might also be negatively applied to certain groups and persons in relation to sexual orientation and gender identity. They include laws based on public decency, public health and security, at times in the guise of local criminal laws and regulations. For examples, transgender women are often targeted and prosecuted on the basis of laws criminalizing sex work, or under laws against "vagrancy".[33] There are equally challenging implications of various religious laws when applied strictly.

35. It should be noted that in some countries where these negative laws exist, they are not applied or not much applied in practice. While this is a stepping stone to mitigation of the situation, the mere existence of the laws still gives rise to bias and prejudices, feeding into extortion, persecution, multiple and intersectional phobia, and other forms of violence and discrimination, and violates international human rights norms and standards. The call to reform such negative laws must therefore be vigorous.

36. On another front, there may also be a need for some criminal laws to tackle violence and discrimination, for example in regard to hate crimes and incitement to hatred, and they should reflect international standards. The situation varies from

[27] See Human Rights Committee, communication No. 488/1992, *Toonen v. Australia*, views adopted on 31 March 1994; and CCPR/C/ETH/CO/1. This position has been reaffirmed on many occasions by United Nations human rights treaty bodies and special procedures mandate holders.

[28] See *Toonen v. Australia*.

[29] See also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person.

[30] See also OHCHR, *Living Free and Equal* (HR/PUB/16/3); UNAIDS, *The Gap Report* (Geneva, 2014); and Transgender Europe, Trans Respect versus Transphobia. Maps available from http://transrespect.org/en/.

[31] Submission of Global Forum on Men Who Have Sex with Men and HIV (USA) to the Independent Expert.

[32] Submission of Mildmay (Kenya) to the Independent Expert.

[33] See for example UNAIDS, *The Gap Report*, and OHCHR, *Living Free and Equal*.

countries that criminalize same-sex relations to those that do not.[34] There is a need for protection against incitement to hatred in all countries, including in those where same-sex relations are not criminalized.[35] The Independent Expert hopes to explore the broader interface between criminal law, related laws and sexual orientation and gender identity in a future report.

37. The table illustrates recent constructive developments showing how some countries have managed to change their laws concerning prohibition of same-sex relations which were contrary to international standards.

38. The checks and balances at the national level are particularly interesting, as seen in regard to the role of various pillars of the State which can activate the reform process. Behind all this, the important role of non-governmental organizations, human rights defenders and independent national human rights institutions should not be underestimated.

Examples of reform of criminalization of consensual same-sex relations, 2012-2016

Year of reform	Country	Old law	Who propelled reform	Current law situation
2012	Lesotho	Article 185(5) of the 1939 Criminal Procedure and Evidence Act states that any person charged with sodomy or assault with intent to commit sodomy may be found guilty of indecent assault or common assault, if such be the facts proved. In addition, the Act mentions "sodomy" as among the offences in respect of which arrests may be made without warrant.	Parliament On 2 January 2012, Parliament enacted the Penal Code Act 2010, revising the country's penal code (in effect since 9 March 2012).	New penal code removed references to sodomy
2014	Palau	Section 2803, chap. 28, "Sex crimes", of title 17 of the Palau National Code 1990 states that every person who shall unlawfully and voluntarily have any sexual relations of an unnatural manner with a member of the same or the other sex, or who shall have any carnal connection in any manner with a beast, shall be guilty of sodomy, and upon conviction thereof shall be imprisoned for a period of not more than 10 years; provided, that the term "sodomy" shall embrace any and all parts of the sometimes written "abominable and detestable crime against nature".	Parliament and President New penal code of April 2014	New penal code did not contain any prohibitions on consensual same-sex sexual activity

[34] Submission of Collaboration Foundation for Aids and Observatoire national des droits des personnes LGBTI et de leurs défenseurs (Cameroon) to the Independent Expert.

[35] Submission of Hyestart Association (Armenia) to the Independent Expert.

Year of reform	*Country*	*Old law*	*Who propelled reform*	*Current law situation*
2015	Mozambique	Articles 70 and 71 of the former colonial penal code of 1886; article 70 mentions the types of security measures. Article 71 pertains to the application of security measures on those habitually practising vices against nature.	Parliament and President On 11 July 2014, the parliament passed by consensus Law 35/2014, replacing the 1886 penal code. The new penal code came into force on 29 June 2015.	New penal code has dropped references to "vices against nature"
2016	Seychelles	Article 151 of the 1955 penal code states that any person who (a) has carnal knowleuge of any person against the order of nature, or (b) has carnal knowledge of an animal or (c) permits male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for 14 years.	Parliament and President On 15 May 2016, the parliament adopted the Penal Code (Amendment) Act 2016, signed on 1 June 2016 by the President. The proposal for the amendment came 3 months after the public announcement by the President that his Government would introduce a bill to abolish section 151, based on his country's 2011 commitment to the Working Group on the Universal Periodic Review to decriminalize homosexuality.	Penal Code (Amendment) Act 2016 repealed article 151 (a) and (c)
	Belize	Section 53 of the former criminal code states that every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for 10 years.	Supreme Court In August 2016, in the case *Caleb Orozco v. The Attorney General of Belize*, the Supreme Court ruled as unconstitutional section 53 of the criminal code.	Para. 99 of the judgment of the Supreme Court states that it is therefore ordered that the following sentence be added to section 53 of the criminal code, chap. 101: "This section shall not apply to consensual sexual acts between adults in private".

Source: Extract from research conducted by the Independent Expert, in collaboration with OHCHR.

39. Several States have also taken steps to decriminalize transgender persons on the basis of their gender identity or expression. For example, Samoa removed provisions on "impersonation of a female" that were used to arrest and fine transgender persons and the fa'afafine when it revised its penal code in 2013.

40. Constructive lessons can be gauged from the following recent submissions to the Independent Expert. National human rights institutions have played a key role in advocating for the repeal of discriminatory laws in all regions of the world. For example, the Asia Pacific Forum of National Human Rights Institutions offers networking and capacity-building as channels for addressing the issue of sexual orientation and gender identity, and the Forum has been assisted by the advice of its Advisory Council of Jurists in favour of decriminalization of consensual same-sex relations.[36]

41. The Australian Human Rights Commission noted that consensual same-sex between adults had never been regulated by federal criminal law; however, it was previously a criminal offence in all Australian states and territories. In 1994 the federal Parliament passed the Human Rights (Sexual Conduct) Act 1994, which provided that sexual conduct involving only consenting adults in private was not to be subject, by or under any law of the Commonwealth, a state or a territory, to arbitrary interference with privacy within the meaning of article 17 of the International Covenant on Civil and Political Rights.[37]

42. The Human Rights Commission of Malaysia pointed out that, given the sensitivities surrounding issues relating to LGBTI rights in Malaysia, it had adopted a step-by-step approach in addressing such issues. In August 2010, the Commission organized a meeting with various Islamic groups with the objective of gaining a better understanding of Islamic perspectives of LGBTI and of substantiating Islamic sensitivities and views regarding such LGBTI actions as same sex intercourse, cross dressing, imitation of the opposite gender and gender reassignment. The application of the principles of non-discrimination under the Federal Constitution on LGBTI was also discussed. The meeting was followed by a roundtable discussion in 2011 during which participants raised some issues related to sexual minorities, including the need to protect sexual minorities from violence through legal and other forms of protection and redress, to recognize transgender persons by ensuring an enabling environment and to review relevant laws to prevent discrimination, for example through the inclusion of sexual orientation and gender identity as a grounds for discrimination in article 8(2) of the Federal Constitution.[38]

43. The Human Rights Commission of New Zealand noted that, in New Zealand, criminal sanctions for same-sex behaviour between consenting adults had been removed 31 years ago, with the enactment of the Homosexual Law Reform Act 1986. Nor is gender diversity criminalized, as New Zealand does not have so-called "cross dressing" laws that criminalize gender expression.[39]

44. The national human rights institution of Cyprus observed that consensual same-sex relations were decriminalized in 1998. They remarked that society was still conservative on sexual orientation and gender identity, but stated that, following systemic reports of the institution but also interventions on individual complaints and participation in the respective discussions in the parliament, positive developments had taken place in significant key areas. They included the legal recognition of same-sex relationships (Civil Union Law of 2015); the penalization of homophobic and transphobic hate speech (Law 87(I) 2015 amending the Penal Law) and hate crime (with the homophobic and transphobic motive as aggravating factor, Law 31 (I) 2010 amending the Penal Law).[40]

[36] Submission of Asia Pacific Forum to the Independent Expert.
[37] Submission of Australian National Human Rights Commission to the Independent Expert.
[38] Submission of Human Rights Commission of Malaysia to the Independent Expert.
[39] Submission of Human Rights Commission of New Zealand to the Independent Expert.
[40] Submission of national human rights institution of Cyprus to the Independent Expert.

45. In their submissions to the Independent Expert, civil society organizations have also highlighted important advances and remaining challenges. A non-governmental organization submitting information on China noted that the old "hooligan crime", which had had an impact on same-sex relations between men, had now been reformed, while gender identities were not criminalized in the country.[41] There remained issues of implementation, for example, in the employment sector, particularly in relation to transgender persons.

46. With regard to Africa, in recognizing that some 33 countries criminalize same-sex relations, out of 54, with many of the negative laws on this front a result of the remnants of colonization, constructive developments should also be identified. In the interim South African Constitution, sections 9(1) and 9(3) make express reference to sexual orientation as a protected ground for non-discrimination. In the famous case of *S v. Kampher*, Justice Ian Farlam nullified the conviction of a man who had confessed to having consensual sex with another man. Immediately after that, the Constitutional Court in *National Coalition for Gays and Lesbian Equality and another v. Minister for Justice and others* held that the South African "sodomy" laws were unconstitutional. In decriminalizing sodomy laws, the Court stated that prohibiting sexual conduct between gay men violated the right to equality. Other positive developments in Africa worth noting include the reform of the Cape Verde penal code of 2004, which eliminated offences related to same-sex activity[42] and the decriminalization of homosexuality in Sao Tome and Principe in 2014. On a particularly positive note, a number of African countries have introduced legislation to explicitly outlaw discrimination on the basis of sexual orientation or they have removed discriminatory provisions of existing employment legislation, including Seychelles in 2006, Mozambique in 2007, Mauritius in 2008 and Botswana in 2010. Several sub-Saharan African countries had never criminalized same-sex sexual activities between adults, including Burkina Faso, the Central African Republic, the Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Gabon, Madagascar, Mali, the Niger and Rwanda.[43]

47. In Kenya, civil society organizations have made a number of recommendations to the authorities, inter alia: the immediate repeal of sections 162(a) and (c) and 165 of the penal code; the introduction of legislation to criminalize hate speech and incitement to violence on grounds of sexual orientation and gender identity, and expression; An immediate ban on forced anal examinations; and prosecution to the full extent of the law of all persons suspected of committing acts of violence, including incitement to violence, on grounds of sexual orientation, gender identity and expression.[44]

48. In regard to criminal laws on cross-dressing and other laws with a negative impact on the human rights of transgender persons, a non-governmental submission provided much insight, pointing out that criminalization heavily impacted transgender and gender diverse people. They welcomed the reference in the first report to criminalization of so-called "cross-dressing". However, there are many other types of gender identity and expression-based criminalization, including "impersonation" provisions as well as inconsistent or unjust implementation of laws on beggary, HIV, sex work, nuisance and loitering in ways that are punitive to transgender persons, most especially toward transgender women. In countries with

[41] Submission of a non-governmental organization in China to the Independent Expert.

[42] Submission of Centre for Human Rights, Faculty of Law, University of Pretoria, to the Independent Expert.

[43] Ibid.

[44] Submission of Kenya Human Rights Commission, National Gay and Lesbian Human Rights Commission, Network for Adolescent and Youth of Africa, Gay and Lesbian Coalition of Kenya and East Africa Trans Health and Advocacy Network to the Independent Expert.

mandatory military conscription, transgender women who have not been able to change their gender markers and transgender men may face legal or economic consequences in that context. Transgender people may in fact be affected by laws criminalizing same-sex relations, whether or not they are in such a relationship. In many countries, transgender women are perceived as men and transgender men are perceived as women, therefore, a transgender woman with a male partner or a transgender man with a female partner is also included within the criminalization of same-sex conduct. Additionally, there are gay, lesbian, and bisexual transgender persons, who are also targets of those laws and policies. Furthermore, transgender persons are often targeted because of their gender expression, as it is commonly used to assume a person's sexual orientation.[45]

VI. Effective anti-discrimination measures

49. Even though human rights are inherent to everyone and involve protection for all persons without exception, persons with an actual or perceived sexual orientation or gender identity diverging from a particular societal concept of sexual orientation and gender identity are at times targeted for violence and discrimination, and violations are pervasive in numerous settings.

50. Full enjoyment of human rights by such persons is a longitudinal challenge, starting in the home and extending to the educational system, the work place and life beyond. Discrimination is also intersectional. Many countries are, however, still hampered by the lack of or insufficiency of anti-discrimination measures, which is linked with the environment leading to violence and discrimination. There is thus a need for effective anti-discrimination measures covering both the public and private spheres, and of a comprehensive kind: not only formal but substantive, not only de jure but also de facto, in addition to the building of a community open to understanding and respecting sexual and gender diversity.

51. Positive developments can be seen in several countries in regard to the adoption of laws and other measures integrating sexual orientation and gender identity as part and parcel of the right to be free from discrimination and the right to equality before the law. Anti-discrimination laws come in various shapes and sizes.[46] For instance, sexual orientation and gender identity might be integrated directly into the constitution, as in the reform of the Constitution in 2008 in Ecuador.[47] South Africa was the first country globally to include protection against discrimination in relation to sexual orientation in its Constitution in 1996, while Fiji was the first country to explicitly incorporate sexual orientation, gender identity and gender expression as protected characteristics in its Constitution in 2013. To date, the constitutions of the Plurinational State of Bolivia and Malta are the only two to explicitly include both sexual orientation and gender identity as non-discrimination grounds. There might be a general law on non-discrimination, such as Thailand's gender equality law, which incorporates the notion of "sex expression" to cover gender identity and related expression. Alternatively, there could be even more specific laws with provisions providing sexual orientation and gender identity protection in key contexts, such as employment, education, health care, housing, provision of goods and services, inheritance, recognition of relationships and family law or immigration. To be effective, anti-discrimination frameworks should provide

[45] Submission of Global Action for Trans* Equality (https://transactivists.org/) to the Independent Expert.

[46] See Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia*, 12th ed. (International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), May 2017).

[47] Submission of Observatorio Ciudadano GLBTI (Ecuador) to the Independent Expert.

for effective measures to investigate alleged violations, redress for victims and accountability for alleged perpetrators.[48]

52. Despite significant advances, important gaps remain, in particular when it comes to measures aimed at protecting discrimination based on gender identity and expression, as illustrated by the fact that fewer than half of the countries which offer legal protection from discrimination explicitly include transgender identities as grounds for discrimination.[49] In addition, only a few States prohibit discrimination in all spheres of life; some legislation fails to cover the private sector; and other laws are not properly enforced.

53. Responses to the Independent Expert's invitation to stakeholders to send in information in 2017 have provided the following examples:

(a) In Sweden, the Discrimination Act prohibits discrimination in relation to sexual orientation and gender identity (and other grounds). There is an equality ombudsman to monitor implementation of the law and various criminal law provisions against homophobic speech and discriminatory statements. If the motive for the offence is related to sexual orientation and gender identity, this is an aggravating circumstance for more severe sanctions. New legislation is being discussed for stronger protection for transgender persons in relation to hate speech and hate crime, as well the issue of privacy;[50]

(b) The legal infrastructure of the United Kingdom of Great Britain and Northern Ireland illustrates the range of possibilities. The 2003 Employment Equality (Sexual Orientation) Regulations prohibited discrimination in employment in relation to sexual orientation. Its 2007 Equality Act (Sexual Orientation) Regulations prohibited discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, housing and public functions. The 2010 Equality Act then included more generally "sexual orientation" among the protected characteristics;

(c) The Commission on Human Rights of the Philippines noted important inputs at the local municipal levels. In addition to its ground-breaking democratic Constitution of 1987 and its Magna Carta of Women, there are also various by-laws on non-discrimination.[51] For example, Quezon City Council in the Philippines adopted an ordinance prohibiting discrimination based on sexual orientation or gender identity and expression;

(d) The Ombudsman of the Plurinational State of Bolivia noted both constitutional provisions on sexual orientation and gender identity as well as range of local by-laws on this front.[52] By contrast, the Equal Opportunities Commission of Hong Kong, China, observes that there is currently no comprehensive anti-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status to ensure legal protection against discrimination for LGBTI persons;[53]

(e) The National Human Rights Commission of Mexico indicated that hate crimes related to sexual orientation and gender identity are considered aggravating

[48] See OHCHR, *Living Free and Equal* (HR/PUB/16/3).

[49] Based on data from Trans Respect versus Transphobia, Transgender Europe (2016). Of the 55 mapped countries/territories which offer legal protection from discrimination, 26 explicitly include trans people. Available from http://transrespect.org/en/map/anti-discrimination/?submap=trans-identities-explicitly-included.

[50] Submission of Sweden to the Independent Expert.

[51] Submission of Commission on Human Rights of the Philippines to the Independent Expert.

[52] Submission of Ombudsman of the Plurinational State of Bolivia to the Independent Expert.

[53] Submission of Equal Opportunities Commission, Hong Kong, China, to the Independent Expert.

circumstances which can give rise to more severe penalties. Issues relating to sexual orientation and gender identity might also be covered by its law on violence against women. The country also has various protocols to help guide the authorities on how to deal with sexual orientation and gender identity situations in an empathetic manner, such as the protocol for judicial operators, including judges and prosecutors, issued by the Supreme Court on this topic;[54]

(f) Germany has an anti-discrimination law covering sexual orientation and gender identity. There is emphasis on implementing the criminal law against hate crimes based on sexual orientation. It is now drafting its national plan against racism which will also cover the issue of transphobia and homophobia.[55] It is complemented by a new law to give compensation to those who were punished for consensual same-sex relations under the Third Reich;

(g) Greece noted that anti-discrimination measures include criminal sanctions in the case of hate crimes and hate speech in relation to sexual orientation and gender identity.[56] This is now complemented by a new law recognizing civil partnership for same-sex couples, and the abolishment of article 347 of the criminal code, which provided a higher age of consent for male homosexual acts;

(h) Switzerland stated that its Constitution has an anti-discrimination provision covering all forms of discrimination, including sexual orientation and gender identity. Civil partnership has been recognized since 2007. Revision of the adoption law in 2016 opens the door to stepchild adoption for same-sex couples. Change of name is also possible in this regard;[57]

(i) In stating that same-sex relations are not criminalized in the country, Slovakia observed that the Constitution regulates the principle of equal treatment for all and there is also a national strategy for human rights promotion.[58] Slovenia cited the new Protection against Discrimination Act 2016 which covers, inter alia, sexual orientation, sexual identity or sexual expression. Sexual orientation is also reflected in the Employment Relationship Act.[59] Poland called attention to both the civil law and criminal law.[60] There is an anti-discrimination act of 2010 which covers sexual orientation, while the penal code covers incitement to hatred and violence, encompassing sexual orientation and gender identity. This is paralleled by labour legislation, a national programme for equal treatment and data collection;

(j) Spain noted that non-discrimination has been integrated into a variety of regional legislation, complemented by criminal provisions against hate crimes. There are a means for registration of hate-related incidents; special prosecutions in this regard; and a protocol of action for police officers in relation to crimes of hatred and discrimination;[61]

(k) A source indicated that, in Ukraine, proposals to introduce laws in the form of the so-called "homosexuality anti-propaganda law" and based on "traditional family values" were withdrawn in 2015, and the legal framework has become more supportive of sexual orientation and gender identity;

(l) While noting the criminal law impacting sexual orientation, a non-governmental source in Pakistan illustrated the varying context in the country,

[54] Submission of National Human Rights Commission of Mexico to the Independent Expert.
[55] Submission of Germany to the Independent Expert.
[56] Submission of Greece to the Independent Expert.
[57] Submission of Switzerland to the Independent Expert.
[58] Submission of Slovakia to the Independent Expert.
[59] Submission of Slovenia to the Independent Expert.
[60] Submission of Poland to the Independent Expert.
[61] Submission of Spain to the Independent Expert.

with measures from the authorities relating to gender identity, including the formation of a national task force by the federal ombudsman and a protection policy for transgender and intersex persons being drafted by the National Commission for Human Rights in cooperation with the transgender community;[62]

(m) A non-governmental organization from India highlighted the key role of the courts in relation to sexual orientation and gender identity, reporting *National Legal Services Authority v. Union of India (NALSA)*, a landmark decision (on respect for gender identity) by the Supreme Court on 15 April 2014; it came at an extremely adverse time for the community, which was still reeling from the disappointing *Kumar Kaushal v. Naz Foundation* judgment by the same court, which upheld section 377 (criminalizing same-sex relations). The NALSA decision became a critical instrument for the fundamental and constitutional rights of the community to remain within the legal discourse;[63]

(n) A non-governmental organization noted that the law on violence against women in Colombia 2008 covers violence against lesbian and bisexual women.[64] There is also intersectionality with conflict and land restitution issues and action against racism. In Latin America, the legalization of civil unions and/or marriage is also a constructive sign of the times; same-sex marriage is legal in a large number of countries, including Argentina, Brazil, Colombia, Mexico and Uruguay;[65]

(o) A non-governmental organization from Peru observed that the Constitutional Tribunal in 2016 helped to resolve the situation of transgender persons by underlining that it is not a pathological condition and that human rights must be respected on the basis of equality for all and without discrimination;[66]

(p) A non-governmental organization source from the United Kingdom recalled the advent of the same-sex marriage law in the country and the Equality Act. However, the mission of the latter is incomplete; the source stated that the use of the term "gender reassignment" in the Act was proving problematic, and that many people thought trans identity implied a binary surgical transition, which the Act's definition also implies. Transgender persons' vulnerability to discrimination and right to equality does not and should not, depend on medical transition;[67]

(q) As reported by the Australian Human Rights Commission, the country's Sex Discrimination Act 1984 was amended by Act. No. 98 of 2013 to include protections against discrimination on the basis of sexual orientation, gender identity, intersex status and relationship status in the areas of employment, education and goods, and services and facilities, but it provided for some exceptions where the conduct is committed by voluntary bodies, religious bodies, educational institutions established for religious purposes and in sport. Despite the Government's commitment to remove those exemptions, the Commission noted that a number of significant and concerning inconsistencies remain between the Sex Discrimination Act and state and territory laws; particularly with respect to anti-discrimination and equal opportunity laws;[68]

(r) The submission from the human rights Ombudsman of Guatemala called for more explicit integration of sexual orientation and gender identity into the legal

[62] Submission of Right Here, Right Now (Pakistan) to the Independent Expert.
[63] Submission of Alternative Law Forum (India) to the Independent Expert.
[64] Submission of Colombia Diversa (Colombia) to the Independent Expert.
[65] In Mexico a Supreme Court ruling effectively paves the way for recognition in all Mexican states, but the implementation of the ruling is not direct and requires action at the individual state level.
[66] Submission of PROMSEX (Peru) to the Independent Expert.
[67] Submissions of Galop and Stonewall (United Kingdom) to the Independent Expert.
[68] Submission of Australian Human Rights Commission to the Independent Expert.

framework as well as measures to counter the violence in the country.[69] The extensive violence is much highlighted by non-governmental organization sources.[70] Lack of knowledge of the law and difficult access to justice may also hamper implementation of a State's anti-discrimination law.[71]

54. The Independent Expert recognizes that participation by LGBTI groups in a variety of professions and positions can also generate role models which can help to overcome stereotypes and prejudices. Countries could consider, for example, how many LGBTI persons have access to employment opportunities, such as in the judiciary and the police, which could be part of the economic and social dividend. Specifically, how many transgender judges have been appointed?

VII. Conclusions and recommendations

55. **The present report builds upon the first report submitted by the Independent Expert in April 2017. Recent developments, particularly in regard to development of human rights law and practice at the international and national levels, intersectionality between sexual orientation and gender identity and other issues concerning violence and discrimination, dialogue and cooperation between the Independent Expert and stakeholders, are considered.**

56. **Two of the various underpinnings introduced in the Independent Expert's first report are singled out for particular attention to help to prevent and overcome violence and discrimination: namely, decriminalization of same-sex relations and gender identity and expression; and effective anti-discrimination measures. The future reports of the Independent Expert, in 2018, will delve into the issues of legal recognition of gender identity; destigmatization linked with depathologization; socio-cultural inclusion; and promotion of education and empathy.**

57. **In regard to the first underpinning, it is most disconcerting that a number of countries criminalize consensual same-sex relations as well as gender identity and its expression. As identified by the Independent Expert, constructive changes are possible, and checks and balances at the national level, together with the role of civil society, non-governmental organizations and national human rights institutions, help to energize the path to reform and compliance with international standards.**

58. **In regard to the second underpinning, anti-discrimination laws and policies can appear in various forms: sometimes general, sometimes specific. Even with a law, there is a need to ensure effective practical implementation, which is correlated with the need for a holistic approach, interlinking laws and policies with responsive programming, case enforcement in the courts (coupled with strategic advocacy and litigation), effective and accessible mechanisms for human rights protection, resource allocation, information and data generation, education and capacity-building, accountability and redress, and space for networking, mobilization and participation for reform.**

59. **The following initial recommendations invite constructive responses from a variety of actors, including States, in cooperation with other stakeholders:**

[69] Submission of Procurador of Guatemala to the Independent Expert.

[70] Submissions of OASIS Guatemala, HIVOS (Guatemala) and Plataforma Internacional contra la impunidad (Guatemala) to the Independent Expert.

[71] Submission by the project "Iguales ante la ley" of Capacitación y Derechos Ciudadanos — CDC (Plurinational State of Bolivia) to the Independent Expert.

(a) States are encouraged to ratify the core international human rights treaties (if they have not yet done so) and to implement them fully, including in regard to respect for sexual orientation and gender identity, in cooperation with other partners. States are urged to follow up the various recommendations under the universal periodic review and from the United Nations treaty bodies and special procedures effectively to ensure improved protection from violence and discrimination based on sexual orientation and gender identity;

(b) The Sustainable Development Goals offer an opportunity to tackle violence and discrimination, also in regard to sexual orientation and gender identity, and that opportunity should be maximized to ensure that no one is left behind without exception or distinction. They are also an avenue for Governments and other actors to generate data and information in a disaggregated manner so as to facilitate future planning and allocation of resources;

(c) There is a need to build checks and balances, especially at the national level, to prevent abuse of power and to ensure compliance with human rights. States should explore collaboration not only with the executive branch of Government, but also with parliamentarians, the judiciary and other actors who may assist in weighing the various actions at the national level to ensure respect for international human rights standards;

(d) States should explore more cooperation with independent national human rights institutions, such as national human rights commissions and ombudspersons, to interlink between international norms and national settings. Those institutions should be supported as part of the checks and balances to prevent and overcome abuses of power and human rights violations, as well to access justice and remedies. They should be paralleled by regional systems and initiatives to help to advance protection against violence and discrimination based on sexual orientation and gender identity;

(e) The work of human rights defenders and the much needed space for civil society, including non-governmental organizations and lesbian, gay, bisexual, transgender and intersex groups and persons, calls for more effective safeguards from States against incursions and reprisals from those protagonists, whether State or non-State actors, which act inconsistently with international human rights standards. Cooperation with a multiplicity of actors, including the business sector, the medical/scientific sector, religious and faith groups and the media, including social networks, should be fostered on the basis of international human rights law;

(f) The role of United Nations bodies, including the Office of the United Nations Commissioner for Human Rights and the General Assembly, is pivotal in raising the issue of violence and discrimination and in addressing it through integrated measures, with due regard to the recommendations from the United Nations human rights mechanisms, including the Independent Expert, as an impetus for follow-up action. The work of the Office and United Nations human rights presences is important and needs to be bolstered in countries and regions where there are major gaps in human rights protection. That work should be complemented by the catalytic role of United Nations country teams and inter-agency cooperation to help to ensure integration of issues relating to sexual orientation and gender identity into programming and practices;

(g) States should reform the laws, policies and practices which criminalize consensual same-sex relations, laws that criminalize transgender persons in relation to gender identity and its expression and other vague laws used to arbitrarily detain and harass LGBT persons. Pending reform, the

preferred policy is to desist from applying such negative laws and policies. That is only an interim measure and is not a substitute for the needed reform, which should be undertaken efficaciously, guided by international human rights law. States should also take stock of other laws, policies and practices which may have a negative impact on people based on their sexual orientation and gender identity, such as laws on public decency/morality and local practices, coupled with relevant reform to reflect international standards;

(h) Adoption of effective anti-discrimination measures by States is critically needed; these measures vary from laws to policies and other action in a comprehensive and human rights-responsive setting. They are tested by access to justice and accessible means of redress, as well as a preventive strategy based on mobilizing the community to understand sexual orientation and gender identity and the call for inclusivity to accord protection to all persons without violence and discrimination;

(i) States should ensure that a variety of stakeholders adopt educational and capacity-building measures in regard to sexual orientation and gender identity to nurture empathy towards the diversity inherent to humanity, from a young age. They should also strengthen capacity-building of law enforcers and related personnel, including through integration of sexual orientation and gender identity into their training and educational curriculum, to enhance understanding for sexual and gender diversity.

60. The Independent Expert looks forward to interlinking consistently with a broad range of stakeholders at the national, regional and international levels, and to embracing diversity and energizing humanity, grounded in the commitment to multilateralism and international law, with the traction for catalytic cooperation and positive change.